89-1021

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No. 89-___

In The

Supreme Court of the United States

October Term, 1989

LOIS MORALES,

Petitioner,

vs.

ALBERT BURROUGHS and
KANSAS STATE UNIVERSITY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

William E. Metcalf
Counsel of Record
Jo Lynne Justus
Metcalf and Justus
3601 SW 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601
(913) 273-9904
Attorneys for Petitioner
Lois Morales

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QUESTIONS PRESENTED

1. Did the State of Kansas violate the Petitioner's rights to due process and equal protection where Petitioner brought an action and summary judgment was entered for the Respondents in the face of disputed material facts?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Kansas Court of Appeals and the Kansas Supreme Court are listed in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

The Petitioner, Lois Morales, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Kansas entered in this proceeding on May 19, 1989.

OPINIONS BELOW

There are no official or unofficial reports of any opinions delivered in the courts below. However, the non-published decisions of the District Court of Riley County, Kansas, the per curiam affirmance of such decision without opinion by the Kansas Court of Appeals, and the

denial of Petition for Review by the Supreme Court of the State of Kansas are appended hereto. The opinion of the District Court of Riley County, Kansas, dated September 6, 1988, is appended as Appendix B, the per curiam affirmance of the Court of Appeals of the State of Kansas, dated May 19, 1989, is appended hereto as Appendix A, and the denial of the Petition for Review by the Kansas Supreme Court, dated September 26, 1989, is appended hereto as Appendix C.

JURISDICTION

The judgment of the Kansas Court of Appeals herein was entered on May 19, 1989. A timely Petition for Review to the Kansas Supreme Court was filed and this Petition for Review was denied on September 26, 1989. Jurisdiction is in this Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> **"Section 1. Citizenship; privileges or immunities; due process clause.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

> State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Constitution, Amendment XIV.

Also, Section 18 of the Kansas Bill of Rights is relevant. This section states as follows:

> **Section 18. Justice without delay**. All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

Additional, relevant statutes are as follows:

> **K.S.A. 60-256. Summary judgment**. (a) *For claimant*. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof. . . .
>
> (c) *Motion and proceeding thereon*. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

K.S.A. 60-513. Action limited to two years. (a) The following actions shall be brought within two years: . . . .(4) An action for injury to the rights of another, not arising on contract, and not herein enumerated. . . .

(b) Except as provided in subsection (c), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action. . . .

STATEMENT OF THE CASE

This case was decided against the Petitioner on summary judgment. This action was brought by Petitioner, an employee of Kansas State University, against Dr. Albert Burroughs, a professor at Kansas State University and Petitioner's supervisor, and Kansas State University for intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress is recognized in Kansas. See, e.g., *Gomez v. Hug*, 7 Kan.App.2d 603 (Kan.App. 1982); *Roberts v. Saylor*, 230 Kan. 289 (Kan. 1981). However, a certain level of outrageous conduct is required to establish the tort. *Id.* Mere insult, indignity or a petty expression to which members of society are necessarily expected and required to be hardened are not enough. *Roberts, supra.*

In essence, the Petitioner claimed that between 1979 and November 15, 1985, Dr. Burroughs intentionally inflicted emotional distress upon her. The specific allegations complained of will not be precisely detailed here. For the purposes of this petition, it is important to note that the District Court of Riley County, Kansas, did conclude that the alleged sexually harassing behavior of Dr. Burroughs toward the Petitioner between October 22, 1979, and 1981, such as Dr. Burroughs asking Petitioner to go to bed with her, trying to hug her in the elevator, grabbing her breasts and squeezing her nipples and putting his foot between Petitioner's legs while she was getting something out of a storage area, were serious enough to make out a case for the tort of outrage. The district court concluded that these acts from 1979 to 1981 were reprehensible and did deviate from reasonable standards of conduct of society particularly in an employer/employee situation, and more particularly because such actions were from a learned university faculty member. The district court clearly implied that these actions by Dr. Burroughs would meet the definition of outrageous conduct required to make out a tort of intentional infliction of emotional distress.

The district court also concluded that actions of Dr. Burroughs which occurred after 1981 were not sufficiently outrageous to constitute intentional infliction of emotional distress.

On summary judgment, Petitioner submitted an affidavit from her psychiatrist, Dr. Herbert Modlin, which stated in essence that, in his medical opinion, the actions of Dr. Burroughs caused the Petitioner to have severe mental depression and the fact that this injury was not

reasonably ascertainable by her until he first saw her in May of 1986. In addition, the psychiatrist submitted a response affidavit which was included as part of the record in this case, which stated as follows:

> "1. On August 29, 1988, I had an opportunity to review Kansas State University's Reply to Plaintiff's Response to Motions for Summary Judgment, and the medical reports attached thereto.
>
> 2. Based on this submission to the Court, I have prepared this affidavit to further explain the previous affidavit I submitted herein.
>
> 3. Lois Morales is susceptible to severe major depression under stressful situations. She has a recurrent stress related disorder. When not under stress, she can obtain reasonable reality adjustment and minimal management of her feelings and behavior. However, under work related stressful situations, she cannot cope adequately. Her symptoms include anxiety, depression and somatic symptoms. This has been a recurrent syndrome and is directly related to Lois Morales' treatment by Dr. Burroughs, as was explained in my earlier affidavit.
>
> 4. Lois Morales was not able to reasonably ascertain that she had a psychiatric injury before May, 1986. Prior to her consultation with me in May of 1986, she was unable to see herself as a psychiatric patient and was unable to recognize that she had a psychiatric injury. In May of 1986, I diagnosed a history of generalized anxiety disorder and noted that she had somatic symptoms which were related to her syndrome as well as anxiety and depression. In my view, this was the first time that she could have recognized that she had psychiatric injury and that Dr. Burroughs caused it. It is my medical opinion that she was unable to recognize the psychiatric

> injury which she suffered prior to this time. This conclusion is based, among other things, on my interviews with Ms. Morales and a review of Lois Morales' history. It should be noted that on page 4 of my diagnostic interview report, which was dated June 6, 1986 (attached to Defendant's response), I state that she had somatic symptoms together with periods of anxiety and depression. It was noted by me at that time that with the removal of stress, she was regaining her equilibrium. Although I state I made no psychiatric diagnosis, I in fact diagnosed a history of generalized anxiety disorder in May of 1986. It must be clearly understood that with recurring psychiatric diseases such as Lois Morales has, I would only have made a psychiatric diagnosis if she was demonstrating symptoms on the dates that I saw her. Based on my experience with Ms. Morales over a period of over two years, she suffers from major depression which is activated when she comes under work related stress. It is this disease which was caused by Ms. Morales' harassment by Dr. Burroughs.
>
> 5. The field of psychiatry relies on data concerning the life experiences of the individual involved. Indeed, together with other factors, my medical opinion at this time is based on the medical history which Ms. Morales provided and my experience with her since May of 1986. This experience indicates that Lois Morales' condition waxes and wanes as her stress level increases and decreases. When she is placed under work related stress, she has severe psychiatric reactions which cause both somatic and psychological symptoms, the most serious of which is major depression. This is a recurring syndrome and it is reasonably certain that she will have these symptoms in the future if she is subjected to work related stress.

6. It is true that in May of 1987 I determined that Ms. Morales had no serious psychiatric disorder which would explain or excuse unsatisfactory work. Further, the statement that Ms. Morales had no serious psychiatric disorder related to the fact that she demonstrated no serious symptoms on the day that I saw her. However, at that time, I did not have the benefit of further evaluation. Since that time, I have done more extensive evaluation of Ms. Morales and have determined that Ms. Morales is unable to tolerate work related stress.

7. With respect to the issue when Lois Morales first could have reasonably ascertained that she had psychiatric injury and that such injury was caused by Dr. Burroughs' treatment of her, it is important to note that my report of June 5, 1986, clearly diagnoses a history of generalized anxiety disorder, and recognizes that Ms. Morales had depression and somatic symptoms. The syndrome from which Ms. Morales suffers waxes and wanes as work related stress increases and decreases. A feature of Ms. Morales' illness is that she had difficulty recognizing her psychiatric illness, even after my diagnosis, and she was incapable of recognizing it before that time. In my view, after I told her she had a psychiatric illness in May, 1986, and that it was caused by the actions of Dr. Burroughs, Ms. Morales may have been able to ascertain that she had a psychiatric injury resulting from Dr. Burroughs' treatment of her. The extent of the injury, however, was not fully realized by her or by myself until well after that time.

8. Psychiatric diagnosis is a subtle but difficult task. It should be noted that some psychiatric illnesses are more difficult to diagnose than others – particularly in a case such as Ms. Morales', because her symptoms do wax and

wane to some extent based upon the work-related stress, or lack thereof, that she is experiencing. I now feel that, although Ms. Morales may be able to somewhat cope with her problems when not subject to stress, Ms. Morales suffers from severe depression when placed in situations that involve work-related stress. Psychiatric diagnosis involves the evaluation of many factors which I feel I have evaluated in this case. With a syndrome such as Ms. Morales has, the course of the illness can change. There may be somatic symptoms, a generalized anxiety disorder such as I recognized in May of 1986, and depression. All of these symptoms result from the syndrome which Ms. Morales has.

9. The medical opinions and documents attached to the Defendant's response are not medically inconsistent. In a disorder such as that of Lois Morales', symptoms change over time. It is usual and expected that symptoms may range from somatic symptoms to anxiety to depression over the course of time. Her symptoms have waxed and waned and changed over this period. All of these symptoms are related to a core psychiatric disorder which was caused by her traumatic experience with Dr. Burroughs.

10. All of the information in this affidavit is my opinion based upon reasonable medical certainty in my independent judgment.

/s/ Herbert Modlin, M.D."

Also included as part of the record and not controverted by Petitioner were two letters from Petitioner – one written in 1983 and one written in 1985. The district court seized on these letters to justify granting summary judgment against Petitioner in the face of Dr. Modlin's affidavits. The first letter was dated April 18, 1983. Here,

Petitioner stated that her "physical and mental health" were affected by the behavior of Dr. Burroughs. The second letter dated November 12, 1985, stated, "Your sexual harassment of me from 1978 to 1983 caused me much mental and physical anguish".

In her affidavit submitted in opposition to the Respondents' motion for summary judgment, the Petitioner stated that she was merely trying to convey the idea that she was upset by these letters.

As further background, it should be noted that Dr. Modlin is a highly qualified forensic psychiatrist. As was pointed out in his first affidavit and the attached resume which is part of the record here, Dr. Modlin received his M.D. degree in 1938 and a Master of Arts Degree in 1940. He had several courses of post-graduate study in neurology and psychiatry. He is licensed to practice medicine in Nebraska, California and Kansas. He is Board certified in neurology and psychiatry by the American Board of Psychiatry and Neurology and the American Board of Forensic Psychology. He has been a neuropsychiatrist for the Army Medical Corps and a psychiatrist for the Veterans Administration. He has been at the Menninger Foundation in Topeka, Kansas, since 1949. At the Menninger Foundation, he served as a Hospital Section Chief, has been on the Psychotherapy Service, and he has served as an Associate Clinical Professor at the University of Kansas Medical School in Kansas City, Kansas. He has also served in the Department of Preventive Psychiatry for 1962 to 1976 and was the Director from 1967 to 1976. He was Professor of Community Forensic Psychiatry at the Menninger Foundation from 1976 to 1981. He is currently

the Noble Professor of Forensic Psychiatry at the Menninger Clinic. He has had many honors and served on many committees. He has served on the Editorial Board of the 1) Bulletin of the Menninger Clinic, 2) Hospital and Community Psychiatry, 3) the Journal of Continuing Education in Psychiatry, 4) Diseases of the Nervous System, and 5) the Bulletin of the Academy of Psychiatry and Law. He is indeed well versed in the fields of psychiatry, neurology and particularly forensic psychiatry.

K.S.A. 60-513 contains the applicable statute of limitations. It is set out above. It states that an action for personal injury such as that brought by the petitioner here must be brought within two years, but that the statute does not start to run until the fact of injury becomes reasonably ascertainable. In no event can such action be brought after ten years.

Here, the injury complained of by the petitioner was the stress related depression which Dr. Modlin concluded was based on Dr. Burroughs' action toward the Petitioner, at least some of which were sufficiently outrageous to establish the tort of intentional infliction of emotional distress. Dr. Modlin clearly states that the Petitioner could not recognize this injury until May of 1986, when he saw her. This sets up an issue of fact.

The district court concluded that this issue of fact could be resolved on summary judgment without trial. Summary judgment was granted to the Respondents and against Petitioner. The district court concluded that the Petitioner could have ascertained her injury before May of 1986 and the action was barred by the statute of limitations: K.S.A. 60-513. This conclusion was affirmed

by the Kansas Court of Appeals and the Kansas Supreme Court denied review.

Petitioner contends that she is entitled to a trial on the issue whether she could have ascertained her injury before May of 1986. She asserts that the denial of a trial on this issue deprived her of equal protection and due process as guaranteed by the Fourteenth Amendment to the Constitution.

REASONS FOR ALLOWING THE WRIT

Since this case was decided on summary judgment, the Petitioner's evidence that she suffered an injury as a direct result of the actions of Dr. Burroughs; that this injury was severe mental depression; and, that such injury was not reasonably ascertainable by the Petitioner until May of 1986 are entitled to controlling weight.

K.S.A. 60-256, which is similar to Fed.R.Civ.P. 56, only allows summary judgment to be granted in case there is no genuine issue as to *any* material fact. Here, Petitioner contends that there is such an issue. The issue is created by Dr. Modlin's affidavit. There is no medical evidence in the record to rebut the affidavit.

At the time summary judgment was granted, Petitioner could find no case which directly addressed an issue similar to the issue presented here. However, since the final order was entered by the District Court of Riley County, a similar case was decided by the Honorable Earl O'Conner, Federal District Judge, in the case of *Equal Employment Opportunity Commission et al. v. Mico Oil et al.*,

No. 87-2471-0 (D. Kan. December 27, 1988). In that case, the intervenor plaintiffs Castle and Rick, alleged victims of sexual harassment, moved to intervene on December 29, 1987. They alleged intentional infliction of emotional distress in an employment situation. The conduct complained of occurred for intervenor plaintiff Castle from December 10 to December 24, 1984, and for intervenor plaintiff Rick from October 17, 1985, until December 5, 1985. Although there plaintiffs did not intervene until after the two year statute of limitations expired (K.S.A. 60-513), they submitted an affidavit of a psychiatric expert stating that they did not discover their emotional distress until months after the conduct giving rise to the distress occurred. On these facts, Judge O'Conner did *not* grant defendants summary judgment on the emotional distress count.

Thus, there is a conflict between the state and federal systems concerning the manner in which the provisions of K.S.A. 60-513 are understood and applied. In Petitioner's view, the only proper construction of the statute is one which allows the Petitioner a trial. Here, K.S.A. 60-513 and K.S.A. 60-256 as applied to Petitioner have denied her due process and equal protection.

It is fundamental that where the outcome of litigation depends on questions of fact, due process requires an opportunity in almost every situation to present evidence and to confront and cross examine adverse witnesses. *Goldburg v. Kelley*, 397 U.S. 254, 269 S.Ct. 1011, 25 L.Ed.2d 287. Here, the Kansas summary judgment statute was employed to deny the Petitioner that right.

Moreover, the Kansas Bill of Rights guarantees Petitioner a right to a trial of her claims where facts are in dispute. Here, because no trial was granted, Petitioner was denied equal protection under state law which, in Petitioner's view, also violates the equal protection clause of the Fourteenth Amendment.

This case presents an important question. How far can courts go in granting summary judgment before violating the litigant's right to trial? Can a state court deny a trial to the Petitioner when facts are in dispute and not violate Petitioner's rights to due process and equal protection under the Fourteenth Amendment? These questions are important because courts at both the federal and state levels are utilizing summary procedures to dispose of litigation. This more frequently creates a high potential for injustice, yet, courts must also guard their dockets to prevent useless litigation. Here, the Petitioner presented the best evidence available to indicate that she could not have ascertained the injury for which she sought recovery until May of 1986 – undisputed medical testimony. The courts of Kansas chose not to grant her a trial on this matter. Petitioner asserts that in this case, she was entitled to such trial.

This Court should consider whether the Constitution requires that the Petitioner be granted a trial in such circumstances.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

WILLIAM E. METCALF
Counsel of Record
JO LYNNE JUSTUS
METCALF AND JUSTUS
3601 SW 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601
(913) 273-9904
Attorneys for Petitioner
Lois Morales

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

Lois Morales Appellant	)	
v.	)	No. 88-62949-A
Albert Burroughs and Kansas State University, Appellees	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

Date September 26, 1989

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 62,949

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

LOIS MORALES,
Appellant,

v.

ALBERT BURROUGHS and KANSAS STATE UNIVERSITY,
Appellees.

MEMORANDUM OPINION

Appeal from Riley District Court; JERRY L. MERSHON, judge. Opinion filed May 19, 1989. Affirmed.

William W. Metcalf and *Jo Lynne Justus*, of Metcalf and Justus, of Topeka, for appellant.

Dorothy L. Thompson, associate university attorney, and *Howard Fick*, of Manhattan, for appellee.

Before ABBOTT, C.J., BRISCOE and BRAZIL, JJ.

Per Curiam: After argument, we determine that no reversible error of law appears and the findings of fact and conclusions of law of the trial court adequately explain the decision. Affirmed under rule 7.042(d) (1988 Kan. Ct. R. Annot. 34).

APPENDIX C

IN THE DISTRICT COURT OF RILEY COUNTY, KANSAS

LOIS MORALES, Plaintiff, v. ALBERT BURROUGHS and KANSAS STATE UNIVERSITY, Defendant.	)	Case No. 87-C-300

COURT JOURNAL ENTRY AND MEMORANDUM OF DECISION TO THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

On March 30, 1988 this Court held a discovery conference with counsel for all parties present. Discovery was cut off on Friday, July 11, 1988 and all motions were to be filed not later than July 15, 1988. At that time oral argument and pretrial conference were set for Friday, August 19, 1988 at 1:15 p.m.

The defendant Kansas State University filed their Motion for Summary Judgment on July 14, 1988 which was within the discovery order. The defendant Albert Burroughs did not comply with the discovery order and did not file any motions. On July 28, 1988, some fourteen days after the deadline, he filed a one page Motion for Summary Judgment which consisted of a request to adopt in toto Kansas State University's Motion for Summary Judgment as his own. Further, the defendant Albert Burroughs did not comply with Local Rule 9 nor Supreme Court Rule 137.

As a result of this filing out of time, plaintiff's counsel William Metcalf set up a telephone conference and requested additional time with which to respond to both of the defendants' Motions for Summary Judgment. For the reason that plaintiff did not object to the defendant Albert Burroughs' Motion being filed out of time, the Court agreed to allow the plaintiff to respond to both Motions on or before August 15, 1988 and the oral argument and pretrial in this matter was moved to August 30, 1988 at 1:15 p.m.

The plaintiff's Brief and Response to the Defendant's Motion for Summary Judgment was filed on August 15, 1988. The defendant Kansas State University filed a response to the plaintiff's Brief on August 26, 1988.

On the morning of August 30, 1988, the date set for oral argument in this matter, the plaintiff filed a Motion to Strike the defendant Kansas State University's Reply. The Court finds that both the reply of the defendant and the plaintiff's late request to reply to the same are not within the discovery parameters and have added little information to the ultimate Motions on file. The plaintiff proceeded on a continuous course of filing new affidavits with alleged new facts and clarifications. With proper discovery and careful review of the discovery record, the Motion for Summary Judgment and reply should be sufficient. Nevertheless, the additional documents have been filed.

The plaintiff's Motion to strike the defendant's reply to the plaintiff's response to the defendant's Motion for Summary Judgment was *denied*. The plaintiff was allowed

to file a response to the defendant's reply and argue the same.

Now on this 30th day of August, 1988, the plaintiff Lois Morales appears in person with her attorney, William Metcalf. The defendant Albert Burroughs appears by his attorney, Howard Fick. The defendant Kansas State University appears by Dorothy Thompson. Dr. William Moore of Kansas State University Veterinary Medicine appeared in person. Oral argument is received by the Court on the two defendants' Motions for Summary Judgment.

The Court advises that it has read the file and the Motions filed by the defendant Albert Burroughs and Kansas State University and the response to the same filed by plaintiff's counsel, Mr. William E. Metcalf. Discovery is now complete in this matter, all motions and responses have been filed, oral argument has been received and the motions are hereby submitted for ruling by the Court.

The Court has reviewed Supreme Court guidelines for trial courts to consider on ruling on Motions for Summary Judgment as set forth in *Mildfelt v. Layer*, 221 Kan. 557, *Fredericks v. Foltz*, 224 Kan. 663, *Farmers State Bank and Trust Company of Hays v. City of Yates Center*, 229 Kan. 330 and *Panhandle Agri-Services, Inc. v. Becker*, 231 Kan. 291.

Some of the principles of summary judgment that the Court must consider are as follows:

1. Where the sole question presented is one of law, a final determination may be had on a Motion for Summary Judgment.

2. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories and admissions and affidavits show there is no genuine issue of material fact remaining, leaving the moving party entitled to judgment as a matter of law.

3. In considering a Motion for Summary Judgment, pleadings and documentary evidence must be given liberal construction in favor of the party against whom the motion is directed. The party against whom the motion is directed is entitled to the benefit of all the reasonable inferences and doubts which may be drawn from the facts under consideration.

FINDINGS OF FACT

The defendant's stated findings of fact set forth in Kansas State University's Memorandum Brief No. 1, 2, and 3 are uncontroverted. Defendant's fact number 4 is not controverted by the plaintiff except plaintiff alleges that the December 17, 1985 letter did not completely report her complaint. Defendant's fact number 5 is not controverted by the plaintiff other than plaintiff alleges additional separate facts set out later in his Brief consisting of a non-specific but general theme that the defendant Burroughs maintained a continuing harassing behavior. Defendant's fact number 7 is uncontroverted by the plaintiff except that plaintiff again alleges a general theme of continuing harrassment.

Defendant's facts number 8 and 9 are uncontroverted by the plaintiff other than plaintiff contends there are additional facts in his Brief. The defendant's facts numbered 10 and 11 are uncontroverted by the plaintiff.

The plaintiff's additional facts are primarily based on her Affidavit signed on August 12, 1988, along with Dr. Modlin's opinions attached to plaintiff's response to the Defendant's Motion for Summary Judgment.

Plaintiff's facts number 11 through 31 refer to a time period up to 1984 and plaintiff's facts number 32 through 34 refer to a time period prior to and culminating on November 5, 1985.

Plaintiff's fact number 35 speaks of her complaint to K.A.P.E. Union and Affirmative Action and she states that *after this, the harassment stopped*. Plaintiff's fact number 36 refers to talking to Affirmative Action *in August of 1985* and her fact number 37 states that she did not know that her problems were psychological although this statement is inconsistent with her letter to the defendant on April 18, 1983 stating that her "physical and mental health" were affected by his behavior and with the language in her letter to the defendant under date of November 12, 1985. (Defendant's fact number 7). Plaintiff's fact number 38 discusses her loss of income and her fact number 39 admits her letters of April 18, 1983 and November 12, 1985 referring to the time period of 1979 through 1983, indicating that she was aware of her mental anguish. She nevertheless asserts that she did not know she was suffering from a *severe* major depression, until Dr. Modlin told her this in May, 1986. The defendant, in additional fact number 12 asserts that Dr. Modlin made no diagnosis after his second examination of the plaintiff on May 1, 1986. Plaintiff's fact number 40 refers to Dr. Modlin's affidavit and the plaintiff's facts number 41 and 42 discuss Dr. Modlin's qualifications and opinions.

The plaintiff repeatedly refers to "additional facts" contained in paragraphs 11 through 41 in her factual statement, however, I agree with the defendants that a review of the content of the "additional facts" reveals no genuine issue as to any facts that are material to determine the questions presented. These "additional facts" consist of generalities and vague allegations which consist of mere conclusory words and phrases, lacking specificity. None of the general allegations of cutting remarks, demeaning remarks or the more specific allegations of the defendant Burroughs laying down the plaintiff's evaluation before her stating, "Read it and weep" rise to the standard of outrageous and extreme conduct. Further, this Court is not persuaded that these allegations of indignities, annoyances or petty expressions constitute a consistent pattern of conduct to bring the defendant Burroughs' alleged statement of "fat and ugly" on November 5, 1985, into the realm of outrageous conduct. The overt and alleged conduct of the defendant Burroughs that indeed could fall within the realm of outrageous conduct occurred between October 22, 1979 and 1981.

In subsection (j) of the plaintiff's fact number 42, plaintiff asserts that her present mental disorder is a direct result of the ongoing continued campaign of harassment by the defendant Burroughs from 1979 through November of 1985. Subsection (k) states that plaintiff suffers from anxiety, major depression and low self-esteem resulting in a diminished capacity to endure stress. In subsection (m), Dr. Modlin offers the opinion that the plaintiff suffers from a major depression as a result of the campaign of harassment by the defendant Burroughs. He further opines that the fact of this injury

was not reasonably ascertainable by the plaintiff until he saw her for the second time in May, 1986. He further offers the opinion that it would not have been possible for a reasonable person to associate this ongoing disease with the actions of the defendant Burroughs until his psychiatric diagnosis in 1986.

Based on the specific legal terms and phrases used by Dr. Modlin, it is inescapable that his opinions were directly influenced by either K.S.A. 60-513(b) or case law or, other legal information supplied or suggested to him.

Although Dr. Modlin's affidavit is replete with facts supplied to him by the plaintiff, they are hearsay and cannot be properly considered in a Motion for Summary Judgment as uncontroverted facts. Indeed, Dr. Modlin's opinions are based on the unilateral recital of facts to him by the plaintiff and his opinions would only be relevant at trial so far as the opinion might aid the jury in the interpretation of technical facts or to assist the jury in understanding the material in evidence. In this case, the plaintiff did not consult with Dr. Modlin until long after the events alleged to have brought about emotional distress and thus the trier of fact would have a similar opportunity to evaluate the situation as Dr. Modlin. Depending upon foundation at trial, Dr. Modlin may or may not be allowed to give his opinion in this case, but it is quite likely, under the facts in this case, that the jury could as laymen, draw appropriate conclusions concerning the facts and the mental condition of the plaintiff on their own from normal experience in life.

Clearly, Dr. Modlin, although he apparently is not hesitant to do so, cannot properly determine facts or

draw legal conclusions such as determining the reasonably ascertainable time of the plaintiff's alleged emotional injury as this would indeed invade the providence of the court who determines conclusions of law and the jury as trier of the facts. Such legal conclusions opined by Dr. Modlin are inappropriate and cannot be properly considered in this motion or for that matter, at trial.

REASONING AND CONCLUSIONS OF LAW

This matter turns on a construction of K.S.A. 60-513(b), under the facts of this case. Said statute provides:

> "Except as provided in subsection (c) of this section, the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action."

The parties agree that the applicable statute of limitations in this case is K.S.A. 60-513(a) which provides:

> The following action shall be brought within (2) years: . . . (4) an action for injury to the rights of another not arising in contract, and not herein enumerated.

The defendants allege that no acts alleged to have occurred within the two year statute of limitations constitute intentional infliction of emotional distress in this matter. That is to say, the defendants argue that none of the acts alleged to have occurred between November 5, 1985 and November 5, 1987 constitute acts to support intentional infliction of emotional distress.

The plaintiff argues because of a continuing pattern of harassment from 1979 through November 5, 1985, that the statute of limitations should not run and argues that the statute has not run for the reason that the plaintiff could not reasonably ascertain her injuries until her severe depression was diagnosed by Dr. Modlin in 1986.

After carefully reviewing the additional proposed uncontroverted facts of the plaintiff, this Court FINDS that they reflect no new material facts in this case on or subsequent to November 5, 1985.

This Court FINDS that the record fails to contain a continuing pattern of harassment or outrageous conduct of the defendant toward the plaintiff during the two year period from November 5, 1985 to November 5, 1987, the date this case was filed. This Court further FINDS that the harassment ceased subsequent to August of 1985. (Plaintiff's facts number 35 and 36).

Inasmuch as the harassment ceased some two years prior to the filing of this lawsuit, This Court FINDS the plaintiff's contention that defendant's harassment over a period of time tolls the statute of limitations is without merit. Further, the Court FINDS that the plaintiff's argument that the defendant's conduct constituted a continuing tort up to November 5, 1985, notwithstanding during

the two years immediately preceding said date the record discloses no conduct on the part of the defendant that could be deemed outrageous, is without merit.

This Court is persuaded to the view and FINDS that the plaintiff has failed to demonstrate that the defendant Burroughs engaged in any specifically articulated activity that could be characterized as extreme and outrageous between November 5, 1985 and November 5, 1987. This Court FINDS nothing to support the plaintiff's contentions of harassment of the defendant in the time period of November 5, 1985 to November 5, 1987 including the incident on November 5, 1985, when the defendant saw the plaintiff in the hall and said, "Good morning madam, I see you're fact [sic] and ugly today". It should be noted that the defendant Burroughs alleges that he said "fat and healthy" rather than "fat and ugly".

This Court, after carefully reviewing the file and going over the discovery record, FINDS that the intemperate and inappropriate remarks of the defendant Burroughs to the plaintiff Morales on November 5, 1985, does not rise to the level of extreme and outrageous conduct to intentionally or recklessly cause severe emotional distress. *Doss & Vee Associates Financial Services*, 215 Kan. 814 and *Gormez v. Hugg*, 7 Kan.App.2d 603.

This Court further FINDS that considering the lack of harassment of the plaintiff by the defendant in the two years immediately preceding November 5, 1987, that the remarks from the defendant to the plaintiff on said date fell more in the area of a mere insult, indignity, or a petty expression to which members of society are necessarily

expected and required to be hardened, all as set forth in *Roberts v. Saylor,* 230 Kan. 289.

Further, this Court FINDS that the comments of the defendant Burroughs to the plaintiff on November 5, 1985 were "mere insults" of the kind which must be tolerated in our roughed edged society and do not rise to the level of extreme and outrageous conduct which would intentionally and recklessly cause severe emotional distress, often referred to as the tort of outrage.

The plaintiff next argues that she could not reasonably ascertain her injury until she was diagnosed by her psychiatrist in 1986. This Court does not find this position to be persuasive.

In this case, the alleged sexually harassing behavior of the defendant Burroughs to the plaintiff, between October 22, 1979 and 1981, such as the defendant asking plaintiff to go to bed with her, trying to hug her in the elevator, grabbing at her breasts and squeezing her nipples and putting his foot between her legs when she was getting something out of the storage area, were all overt and clearly ascertainable facts to the plaintiff. Simply put, the plaintiff could not avoid being very much aware of this improper activity and was necessarily aware of and realized that harm was done to her at that time, both physical and psychological. As heretofore previously mentioned, the plaintiff stated in her letter of April 18, 1983 to the defendant that her "physical and mental health", were affected by his behavior which observation was again ratified in another letter dated November 12, 1985 from plaintiff to the defendant wherein the plaintiff stated, "your sexual harassment of me from 1978 to 1983

caused me much mental and physical anguish". Plaintiff could have brought a lawsuit at any time when these alleged activities were taking place but she declined to do so.

Specifically, this Court holds that the issue of law and interpretations of the statute of limitations in this matter is controlled by the case of *Roe v. Diffendorf*, 236 Kan. 218. It is noted that this opinion was handed down after being appealed from this Court. It is further noted that this Court took a different view of the interpretation of K.S.A. 60-513(b), until receiving the instructive ruling of the Supreme Court in said case. On Page 222 of said opinion, the Court states:

> The rule which has developed is: the statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the injured person . . . *We hold the use of the term "substantial injury" in a statute does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations. Rather it means the victim must have sufficient ascertainable injury to justify an action for recovery of the damages, regardless of extent.* An unsubstantial injury as contrasted to a substantial injury is only a difference in degree, i.e., the amount of the damages. That is not a legal distinction. Both are injury from which the victim is entitled to recover damages if the injury is the fault of another. (Emphasis supplied)

In *Roe*, the Supreme Court ruled that under K.S.A. 60-513(b), that the injury and the act of negligence were both readily ascertainable.

The factual issue to be determined in this matter is whether K.S.A. 60-513(b) requires a party injured by a negligent act of another to have knowledge of the extent of the injury for the statute of limitations to commence running. In the case of *Brueck v. Krings*, 230 Kan. 466, a case involving negligence on the part of an accounting firm, the Court held that it was knowledge of injury, not the extent of the injury, which was important to the statute of limitations question.

The alleged harassing activities of the defendant Burroughs to the plaintiff Morales, from 1979 through 1981 are indeed reprehensible and deviate from reasonable standards for the conduct of society, particularly in an employer-employee situation and more particularly by a learned university faculty member. Nevertheless, this matter must be determined on the issue of whether or not the statute of limitations has run as a matter of law and such is the task of this Court.

After carefully reviewing the file, after reviewing the discovery record and the briefs and facts as presented by the respective parties in this matter, this Court FINDS as a matter of law that both the acts of the defendant and the resulting injury to the plaintiff, were reasonably ascertainable by the plaintiff prior to November 5, 1985. This Court further FINDS that the plaintiff had knowledge that she was both physically and psychologically injured, albeit she may not have been aware of the full extent of her psychological injury. The Court further FINDS that the plaintiff's injury and the act of negligence causing the injury were both readily ascertainable prior to November 5, 1985 and that there is nothing in the discovery record to support outrageous conduct or that

emotional injuries were suffered by the plaintiff on November 5, 1985 or subsequent thereto.

WHEREFORE, IT IS THE JUDGMENT AND ORDER OF THE COURT, that the two year statute of limitations applicable in this case has run as a matter of law and the Motions for Summary Judgment as filed by Kansas State University and the defendant Albert Burroughs are hereby *sustained*.

This Court Journal Entry and Memorandum of Decision on the defendants' Motions for Summary Judgment is effective this 6th day of September, 1988. The original of this Journal Entry has been filed with the Clerk of the District Court of Riley County, Kansas and copies have been sent to counsel; no further Journal Entry is required.

IT IS SO ORDERED.

/s/ Jerry L. Mershon
JERRY L. MERSHON
District Judge – Division II

(2)

CASE NO. 89-1021

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1989 TERM

LOIS MORALES,

Petitioner,

vs.

ALBERT BURROUGHS and KANSAS STATE UNIVERSITY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

BRIEF OF RESPONDENTS IN OPPOSITION

Richard H. Seaton
University Attorney
Kansas State University
111 Anderson Hall
Manhattan, Kansas 66506
(913) 532-5730
Attorney for Respondents

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STATEMENT OF THE CASE

On November 5, 1987, petitioner, Lois Morales, sued a professor at Kansas State University, and the University for intentional infliction of emotional distress. Petitioner alleged that Dr. Burroughs, now an emeritus professor, sexually harassed her from 1979 to 1983.

Petitioner alleged that the following specific acts by Dr. Burroughs took place on October 22, 1979, and either a year and one-half or two years thereafter: (a) He asked her to go to bed with him; (b) he tried to hug her in the elevator; (c) he grabbed at her breasts, squeezing her nipples; and (d) he once put his foot between her legs when she was getting something out of the storage

area.

In a letter dated April 18, 1983, petitioner wrote to Dr. Burroughs claiming that her "physical and mental health" were affected by his alleged behavior towards her. In a second letter to Dr. Burroughs dated November 12, 1985, petitioner stated, "your sexual harassment of me from 1978 to 1983 caused me much mental and physical anguish...."

Petitioner consulted a psychiatrist, Dr. Herbert Modlin, on April 29 and May 1, 1986. Dr. Modlin made no diagnosis after the second examination on May 1, 1986. Dr. Modlin examined petitioner for the third time on May 18, 1987, less than six months prior to the filing of this lawsuit. At the end of that

examination he made the following diagnosis: "I pointed out that she has no serious psychiatric disorder which would explain or excuse unsatisfactory work."

In response to defendants' motions for summary judgment, plaintiff filed an affidavit impeaching the admissions contained in her letters to Dr. Burroughs by stating that she was merely trying to convey the idea that she was "upset" by his actions. Plaintiff also filed affidavits by Dr. Herbert Modlin. Those affidavits contained statements impeaching his own reports and concluding that petitioner's alleged injury was not "reasonably ascertainable" to her until he saw her in May, 1986.

The District Court of Riley County, after reviewing the discovery record, ruled that petitioner's injury and the act causing the injury were both readily ascertainable prior to November 5, 1985, and that the two year statute of limitations contained in K.S.A. 60-513 had run. The Court thus granted defendants' motions for summary judgment. This decision was affirmed by the Kansas Court of Appeals. The Kansas Supreme Court denied review.

SUMMARY OF ARGUMENT

Petitioner cannot escape summary judgment by filing affidavits by herself and a psychiatrist for purposes of impeaching her own written admissions that she recognized her

extreme emotional distress more than two years prior to the filing of this lawsuit.

Also, in this case, her psychiatrist's testimony would not be admissible because a jury can evaluate emotional distress without expert assistance and because her psychiatrist's testimony would invade the province of the jury.

Finally, this case does not represent a conflict on a federal question between the state and federal systems. Summary judgment is a fact-based determination. The existence of another decision denying summary judgment by a federal court shows merely that the two courts were applying a summary judgment rule to different sets of facts. The denial

of a trial by the application of a summary judgment rule does not create a federal due process question. Thus, a writ of certiorari should be denied.

REASONS FOR DENYING WRIT

A. ANY EMOTIONAL DISTRESS SUFFERED BY PETITIONER FOR ACTS PRIOR TO NOVEMBER 5, 1985, WERE REASONABLY ASCERTAINABLE TO HER MORE THAN TWO YEARS PRIOR TO THE FILING OF HER LAWSUIT.

K.S.A. 60-513(b) makes the following exception to the two year statute of limitations applicable in this case: The cause of action... "shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not

commence until the fact of injury becomes reasonably ascertainable to the injured party...." Plaintiff invokes this exception, claiming that she had the first medical diagnosis that her problems were related to the actions of Dr. Burroughs on April 29 and May 1, 1986. However, the undisputed facts in this case must bar the plaintiff from contending successfully that the fact of her alleged injury was not "reasonably ascertainable" prior to November 5, 1985, the date two years prior to the filing of this lawsuit.

First, in her letter of April 18, 1983, to Albert Burroughs, petitioner claimed that her "physical and mental health" were affected by his alleged behavior toward her.

Again, in a letter of November 12, 1985, petitioner states to Dr. Burroughs that "your sexual harassment of me from 1978 to 1983 caused me much mental and physical anguish...." Moreover, it must be kept in mind that plaintiff is alleging the tort of outrageous conduct and claiming in paragraph 6 of her petition that Dr. Burroughs' behavior "caused plaintiff extreme emotional distress so severe that no reasonable person could be expected to endure it." Accepting petitioner's own account in her letter of April 18, 1983, the extreme acts attributed to Dr. Burroughs included asking her to go to bed with him, hugging her in the elevator, and grabbing at her breasts and squeezing her nipples. Those acts, she states,

took place during a period beginning October 1979 and extended for a year and one-half. It is inconceivable that any emotional distress from these alleged acts was not spontaneous and immediate. In Roberts v. Saylor, 230 Kan. 289, 294 (1981), the court has said that "[e]motional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry." If, indeed, Ms. Morales experienced emotional distress as a result of Dr. Burroughs' alleged behavior, she would not need to have a psychiatrist tell her of the injury five or more years

after the behavior occurred. And indeed, as noted in her own letters, she claims to have suffered mental and physical anguish at the time of Dr. Burroughs' alleged conduct towards her. Thus, the exception to the statute of limitations for situations where the fact of injury is not reasonably ascertainable until some time after the initial act cannot be applied to these facts. This conclusion is particularly clear in the light of Roe v. Diefendeorf, 236 Kan. 218, 222 (1984). There the court interprets K.S.A. 60-513(b) to mean that "[t]he statute of limitations starts to run in a tort action at the time a negligent act causes injury if both the act and the resulting injury are reasonably ascertainable by the

injured person." Further, the court states that the statute "does not require an injured party to have knowledge of the full extent of the injury to trigger the statute of limitations." If Ms. Morales suffered any substantial injury for any acts of Dr. Burroughs committed prior to November 5, 1985, that injury was, beyond a doubt, reasonably ascertainable to her.

As noted, plaintiff does not controvert the statements made in her letters to Dr. Burroughs of April 18, 1983, and November 12, 1985. In these letters she states that her "physical and mental health" were affected and that he had caused her "much mental and physical anguish." However, in her affidavit, plaintiff attempts to

deny the clear meaning of these statements and to say that she meant to say that the behavior she alleged on the part of Dr. Burroughs merely "upset" her. The obvious purpose of the latter statement is to try to create an issue as to whether she ascertained the claimed injury more than two years before she filed this action.

The Kansas Supreme Court has said that a party may not defeat summary judgment by filing a subsequent affidavit impeaching the party's previous testimony. Mays v. Ciba-Geigy Corp., 233 Kan. 38 (1983). While plaintiff's admissions were contained in her letters and not in previous deposition testimony, the same rule should apply. These letters

have been presented previously by plaintiff for evidentiary purposes and are her uncontroverted statements. As the Court has pointed out, the "object of summary judgment is to separate real issues from those that are formal and pretended...." Mays at 43 quoting Radobenko v. Automated Equipment Corporation, 520 F.2d 540 (9th Cir. 1975). To allow plaintiff to raise an issue of fact by controverting her earlier plain statements is to undermine the very purpose of the summary judgment process.

B. DR. MODLIN'S AFFIDAVITS ARE INADMISSIBLE FOR SEVERAL REASONS.

In determining admissibility on a summary judgment motion, the same standards apply as at trial, including the standards for admissibility of

expert testimony. Zenith Radio Corp. v. Matsushita Electrical Co., 505 F.Supp. 1125, 1139-41 (1980). In Lollis v. Superior Sales Co., 224 Kan. 251, (1978) the Kansas Supreme Court set out rules concerning the admissibility of expert testimony applicable in this case:

> Under K.S.A. 60-456 the opinion testimony of experts on the ultimate issue or issues is not admissible without limitation. Such testimony is admissible only so far as the opinion will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding the material in evidence. (Syl. 1)
>
> The basis for the admission of expert testimony is necessity, arising out of the particular circumstances of the case. Where the normal experience and qualifications of laymen jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are inadmissible. (Syl. 3)

The Kansas Supreme Court has

said that "[e]motional distress passes under various names such as mental suffering, mental anguish, nervous shock, and includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, embarrassment, anger, chagrin, disappointment, and worry." Robert v. Saylor, 230 Kan. 289, 294 (1981). All of these mental reactions are well within the experience of every human being. The injury that may result from outrageous conduct is the kind of reaction that has been experienced over and over by any adult person. No showing of some esoteric psychological state is required, as plaintiff would have the Court believe. Moreover, it is important to recognize that it is uncontroverted that plaintiff did not

consult with Dr. Modlin until long after the events alleged to have brought about plaintiff's emotional distress. He was therefore in no better position to evaluate the plaintiff's mental reaction at the time of those events that are the subject of this lawsuit than is the Court.

In ruling on defendants' motions for summary judgment, the Court had to determine whether any emotional distress suffered by the petitioner for acts prior to November 5, 1985, was reasonably ascertainable by her. The plaintiff's expert, Dr. Modlin, in his affidavit attempts to usurp the Court's role and make that judgment. Plaintiff's factual statement quotes Dr. Modlin as

concluding that, "[t]he fact of this injury was not reasonably ascertainable by plaintiff until Dr. Modlin saw her for the second time in May, 1986." This is a legal question to be determined by the Court. The inadmissibility of such a statement is supported by State v. Hobson, 234 Kan. 133, 161 (1983). In that case, the trial court excluded proffered opinion testimony from a psychiatrist, based on his contact with the accused subsequent to the time when the crime was committed, that she could not have committed the crime because she lacked the mental capacity to do so. The court found that the facts presented by the evidence were neither technical, complicated, nor beyond the average experience and common

knowledge of the jury. The appellate court found that the proffered evidence "encroached directly upon the jury's exclusive province to determine from the evidence whether or not the appellant actually committed the crime...."

"Mere qualification as an expert is not a license to invade the jury's function by telling the jury what result to reach... (citations omitted);" nor is it appropriate for an expert to supplant the judge's function to instruct the jury on the law. Fund of Funds, Ltd. v. Arthur Andersen and Company, 545 F.Supp. 1314, 1372 (1982). The reason for the inadmissibility of Dr. Modlin's opinions as set out in his affidavit are clearly explained in a fairly

recent federal case:

> ...opinions do not assist the jury when they are cumulative of evidence already before the jury, or when the expert has sifted through that evidence reaching a conclusion which in essence attempts to tell the jury how it should decide the case. Rather, the expert must utilize specialized knowledge, not ordinarily possessed by the laymen, to reach an opinion which truly aids the jury in understanding the evidence or in determining of fact in issue. We think one of the best expressions of this principle is contained in Stern, Toward a Rationale for the Use of Expert Testimony in Obscenity Litigation, 20 Case Western L. Rev., 527, 546 (1969): The expert should strive to instruct the court in the ways of his work, whether it be psychology, literature or whatever, and to explain the nature of the judgments made in that work.... (emphasis added)
>
> If...the expert opinions in this litigation stem merely from a rehash of the evidence already before the trier of fact without adding a component of expertise, i.e., his [the expert's] work, "those portions will be found inadmissible because they are the unhelpful "oath-helping" of a

"conspiracyologist." Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F.Supp. 1333-34 (1980).

Dr. Modlin, in his affidavit, does nothing more than recite the statements of the plaintiff and draw conclusions of law that she suffered extreme emotional distress and that she was not able to ascertain prior to his diagnosis that she suffered extreme emotional distress. Such testimony is inadmissible in that it invades the province of the Court.

C. THIS CASE PRESENTS NO CONFLICT REQUIRING SUPREME COURT REVIEW.

Petitioner contends that there is an issue to be resolved by the Supreme Court because, in another case decided in Federal District Court, an affidavit from a psychiatrist was found to have raised a factual issue

concerning when the plaintiffs in that case had discovered their alleged injury. She contends that a conflict on a federal question has thereby been created.

A summary judgment decision under K.S.A. 60-256, like Fed. R. Civ. P. 56, is a fact-based decision. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." K.S.A. 60-256(c). In this case, the petitioner made clear statements that she recognized her emotional distress

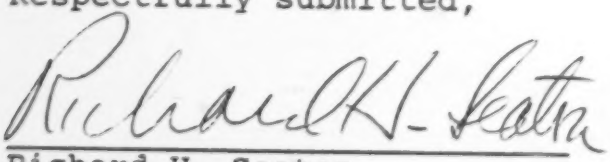
far more than two years before she filed her lawsuit. The District Court of Riley County did not find that her own attempts to impeach her admission or the affidavits of Dr. Modlin used for this purpose succeeded in raising a genuine issue of material fact. Petitioner relies on Equal Employment Opportunity Commission, et al. v. Micro-Oil, et al., No. 87-2471-0 (D.Kan., December 27, 1988). In that case the court applied the federal judgment rule to a different set of facts and denied summary judgment. There is no mention of any admissions of earlier recognition of the injury. Thus, these cases do not represent a conflict between the state and federal systems, but rather merely a difference in the facts upon which the

two courts applied a summary judgment rule. Neither court was involved in deciding a federal question. Moreover, the fact that a grant of summary judgment precludes a trial creates neither a conflict nor a federal due process question, as petitioner contends.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



Richard H. Seaton
University Attorney
Kansas State University
111 Anderson Hall
Manhattan, Kansas 66506
(913) 532-5730

CERTIFICATE OF SERVICE

I, Richard H. Seaton, hereby certify that I served copies of the foregoing Brief of Respondents In Opposition, by depositing the same in the United States mail, postage prepaid, this 26th day of January, 1990, addressed to:

William E. Metcalf
Jo Lynne Justus
METCALF AND JUSTUS
3601 S.W. 29th, Suite 207
P.O. Box 2184
Topeka, Kansas 66601

Richard H. Seaton

Richard H. Seaton